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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6361

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions	5
Statement of the Case	5
A. The Undisputed Facts	5
B. The Consent Decree	9
C. The Seniority Findings and Order	10
D. The Court of Appeals Opinion	13
Reasons for Granting the Writ	15
Argument	19
Conclusion	31

Cases Cited

Allen v. Terminal Transport Co., Inc., 5 FEP Cases 673 (N.D. Ga. 1972)	16
Bing v. Roadway Express Co., 444 F.2d 687 (5th Cir. 1971)	16
Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973)	16, 17, 18, 20, 21
Black v. Central Motor Lines, Inc., 1 FEP Cases 586 (W. D. N.C. 1968)	16

Diaz v. Pan American World Airways, Inc., 346 F.Supp. 1301 (S.D. Fla. 1972) 17

E.E.O.C. v. Braswell Motor Freight Lines, 8 FEP Cases 754 (N.D. Tex. 1974) 16

E.E.O.C. v. McLean Trucking Co., 7 FEP Cases 299 (W. D. Tenn. 1974) 16

Encina v. Tony Lama, 316 F.Supp. 239, affirmed, 448 F. 2d 1264 (5th Cir. 1971) 29

Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974) 16

Hairston v. McLean Trucking Co., 11 FEP Cases 91 (4th Cir. 1975) 16

Hayes v. East Texas Motor Freight, Inc., 6 FEP Cases 1000 (W.D. Tenn. 1972) 16

Henderson v. Eastern Freightways, Inc., 460 F.2d 258 (4th Cir. 1972), cert. denied, 410 U.S. 912 (1973) 16

Herrera v. Yellow Freight System, Inc., 505 F.2d 66 (5th Cir. 1974) 16, 29

Humphrey v. Moore, 375 U.S. 335, 346 .....19, 22

In re Georgia Highway Express, 150 NLRB 1649 at 1651 6

Johnson v. Georgia Highway Exp., Inc., 417 F.2d 1122 (5th Cir. 1969) 16

Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied 401 U.S. 954 (1971) 16

Jones v. Pacific Intermountain Express, 10 FEP Cases 913 (N.D. Cal. 1975) 16

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 16

Maldonado v. Yellow Freight System, Inc., 10 FEP Cases 1290 (C.D. Cal. 1975) 16

McDonald v. Santa Fe Trail Transp. Co., 513 F.2d 90 (5th Cir. 1975) 16

McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 .....14, 15, 18, 21, 28

Meadows v. Ford Motor Company, 510 F.2d 939, 949 (6th Cir. 1975) 30

Quarles v. Phillip Morris, Inc., (E.D. Va. 1968), 279 F. Supp. 505 at 518 17

Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69 (5th Cir. 1974) 16, 29

Rodriguez v. ETMF, 505 F.2d 40 (5th Cir. 1974) 14, 16, 17, 18, 20, 21, 28

Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) 16

Sagers v. Yellow Freight System, Inc., 388 F.Supp. 528 (N.D. Ga. 1974) 16

Salinas v. Roadway Express, Inc., 10 FEP Cases 1173 (W.D. Tex. 1975) 16

Taylor v. Pacific Intermountain Express Co., 394 F.Supp. 72 (N.D. Ill. 1975) 16

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) 16, 17, 18, 19, 20, 21

United States v. Central Motor Lines, 338 F.Supp. 532 (W.D. N.C. 1971) 16, 17

United States v. East Texas Motor Freight System, Inc., 10 FEP Cases 971 (N.D. Tex. 1975) 16

United States v. International Bhd. of Teamsters, Civil No. 73-2214 (5th Cir. 1975) 18

United States v. Lee Way Motor Freight, Inc., 7 FEP Cases 710 (W.D. Okla. 1973) 16, 17

United States v. Navajo Freight Lines, Inc., 6 FEP Cases 274 (C.D. Cal. 1973) 16, 17

United States v. Pilot Freight Carriers, Inc., 6 FEP Cases 280 (M.D. N.C. 1973) 16, 17

United States v. T.I.M.E.-DC, 6 FEP Cases 690 (N.D. Tex. 1972) 17

U.S. v. Jacksonville Terminal, et al., 451 F.2d 418 (1971), cert. den. 406 U.S. 906 17

Witherspoon v. Mercury Freight Lines, Inc., 457 F.2d 496 (5th Cir. 1972) 16

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75 Harv. L.R. 1532, 1535 (1962) 19

84 Harv. L.R. 1109 21

28 U.S.C. § 1254(1) 2

42 U.S.C.A. §§2000e-2(a) through (j) 5, 23

42 U.S.C.A. §§ 2000e-6 ..... 5, 15, 26

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To the United States Court of Appeals for the Fifth Circuit

The petitioner, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "I.B.T."), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 8, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F.2d 299. It is reproduced in the Appendix hereto (App. p. A-1).[1]

The District Court's "Final Order," dated March 2, 1973, unreported, is reproduced in the Appendix (App. p. A-94).

The District Court's Order of March 19, 1973, also unreported, amending the "Final Order," is reproduced in the Appendix (App. p. A-117).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (Appendix, p. A-1). This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1

Does a union violate Title VII of the Civil Rights Act of 1964, as amended, solely by continuation of a seniority system

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[1] The Appendix to this Petition is presented in a separate volume, designated herein: "App."

The pertinent District Court's preliminary opinions are reproduced in the Appendix as follows:

December 31, 1971, 335 F.Supp. 246, 4 F.E.P. Cases 77 (App. p. A-45)

January 20, 1972; 4 F.E.P. Cases 875 (App. p. A-50)

October 19, 1972; 6 F.E.P. Cases 690 (App. p. A-56)

December 6, 1972; 6 F.E.P. Cases 703 (App. p. A-79)

created in the 1940's which establishes separate seniority rosters for "road" and "city" motor carrier employees; where, on the uncontradicted record such seniority system:

(a) was provided in lawful collective bargaining agreements negotiated in good faith pursuant to the requirements of the Labor Management Relations Act, and with no intent to discriminate on account of race;

(b) constituted a bona fide seniority system, established in collective bargaining agreements assuring job security for workers who have had no hand in their employer's racial discrimination;

(c) was established in separate bargaining units in conformity with NLRB precedents;

(d) applies equally to whites, blacks and browns in protection of seniority on the basis of entry date into the particular bargaining unit;

(e) does not involve a "line of progression," and does not affect promotion from unskilled entry level to skilled employment;

(f) equally affects white, black and brown "city" employees who wish to transfer to the "road", to the extent that "road" seniority for all is computed from the date of entry into the "road" unit; and thus serves to minimize movement from "city" to "road" of all employees, regardless of race; and

(g) is viewed by the Court of Appeals as improper only because, in that Court's view, its continuation serves to perpetuate the employer's prior unlawful discrimination in hiring.

2

In a pattern or practice suit under § 703 of Title VII of the Civil Rights Act, as amended, where:

(a) The employer acknowledges pre-Act racial discrimination by the employer, and

(b) the Court of Appeals has found post-Act "minority hiring progress [to be] laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment," are statistics showing disparate *present incumbency* of whites (91%) v. minorities (9%) "dispositive . . . in a pattern or practice claim" as held by the Court of Appeals; or must an ongoing post-Act pattern or practice of discriminatory hiring and job assignment be shown?

3

Assuming, *arguendo*, the validity of a finding of unlawful pattern or practice of racial discrimination, in fashioning a remedy.

(a) May fictional seniority benefits be awarded to all minority employees, solely on the basis of their race, without regard to whether they were individually affected by the unlawful pattern or practice?

(b) Do different standards for determining individual relief under Title VII apply depending on whether the action is an "individual", "class" or "pattern or practice" suit?

4

Where an industrywide national collective bargaining agreement provides only that "seniority rights shall prevail under this

agreement. . . ." and "the extent to which seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental agreements," may a Court make seniority determinations in the absence of the autonomous union entities which are parties to the supplemental agreements which specify the various seniority systems?

STATUTORY PROVISIONS

Sections 703, (a) through (j) and 707(a) through (e) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e-2(a) through (j) and 6(a) through (e) are reproduced in the Appendix (App. pp. A-119 to 124).

STATEMENT OF THE CASE

A

The Undisputed Facts

In this "pattern or practice" suit brought pursuant to §703 of Title VII of the Civil Rights Act of 1964, as amended, the Government[2] alleged that TIME-DC (T-DC) a nationwide motor freight carrier had engaged in discriminatory hiring, assignment and promotion practices against blacks and Spanish-surnamed Americans (SSA's); and that I.B.T. also violated the Act solely because it was party to collective bargaining agreements which provided for accumulation of seniority in separate "road" and "city" bargaining units, which tend to prevent transfer by minorities to the road classification and thus perpetuate the effects of the employer's discrimination.

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[2] The suit was filed by the Attorney General under § 707(a) of Title VII of the Civil Rights Act of 1964, as amended; 42 U.S.C.A. §§ 2000e-6.

It is stipulated: "The government does not allege . . . that the bargaining units were established for the purpose of discrimination on the basis of race or national origin."[3]

IBT had nothing to do with the hiring or job assignments. Any discrimination with respect to hiring or job assignment was the sole responsibility of the employer.[4]

The wages, hours and working conditions of most of the T-DC drivers, dockmen, and mechanics, and several groups of its clericals are provided in collective bargaining agreements with eighty-three autonomous local unions affiliated with IBT. There are several hundred separate agreements with the many autonomous local unions covering separate units of T-DC employees.[5]

These separate contracts (each consisting of three parts: the National Master; the appropriate area supplement and the local addenda or riders) each cover separate appropriate bargaining units conventional in this industry; and in a pattern established in a long line of NLRB decisions defining appropriate bargaining units.[6]

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[3] Pre-trial order ¶ 3(17); Ct. of Appeals Appendix p. 110.

[4] There is neither allegation, nor evidence that the unions had anything to do with hiring or job assignment. The sole complaint as to the union is that the collective bargaining agreements "prevent or tend to prevent [minority employees] from transferring . . . to the higher paying more desirable job classifications . . ." Pre-trial Order, ¶ 2(2); Ct. of Appeals Appendix, p. 97.

[5] See Appendix B to Pre-Trial Order. It is stipulated that these contracts are with "certain local unions chartered by the Teamsters . . . " Pre-Trial Order, ¶ 3(6); Ct. of Appeals Appendix, p. 104.

[6] See *In re Georgia Highway Express,* 150 NLRB 1649 at 1651, where the Board held:

> ". . . The Board has long held that local drivers and over-the-road drivers constitute separate appropriate units where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests which can effectively be represented separately for bargaining purposes. . . .
>
> In view of the different duties and functions, separate supervision, and different bases of payment, it is clear that the over-the-road drivers have divergent interests from those of the employees in the unit sought and should not be included in that unit."

These separate bargaining units conventionally and traditionally are: "Road"; "City"; "Clerical" and "Garage."[7]

Seniority rights are established in each of the contracts. Length of service with T-DC, i.e., "company seniority" is provided to be significant in computing rights to vacations, pensions, and other fringe benefits.

But for purposes of bidding for "runs" or posted job openings "unit" seniority is controlling. Thus, each employee will have two significant seniority dates: "company" seniority, significant for vacations, pensions and fringes; and "unit" seniority, controlling job bid rights, layoff and recall.

Each contract provides for posting of vacancies, and guarantees incumbents in that unit the right to bid on the basis of unit seniority.

In the road unit, for example, the more desirable jobs, i.e., those operated over the best roads, under optimum driving conditions, are ordinarily bid and obtained by those who have worked longest in the road unit.[8] Conversely, the less desirable jobs are the lot of those having least unit seniority. And

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[7] In certain of the larger cities, Los Angeles and Chicago, the "City" unit evolved into separate units, each covered by a separate contract applying to city drivers, heavy duty city drivers, and dockmen, respectively.

[8] On infrequent occasions a driver with high road unit seniority may for some personal reason bid a run which is generally considered less desirable by his fellows.

those who have attained sufficient unit seniority to select and hold desirable runs have earned the right by first driving the less desirable runs, and finally, upon acquiring experience and seniority, have advanced to the point where their unit seniority permits selection of better runs.

Seniority, then, is a valuable right, which exists solely by reason of the collective bargaining agreements—and with respect to each individual employee has been earned by long toil. Seniority is greatly valued by the working man. Like his house, or his bank account, it is a valuable asset—it along with a grievance and arbitration procedure constitute job security. Accordingly, workmen jealously guard their seniority rights—and their labor organizations, in the course of collective bargaining often trade off other potential benefits in order to secure enforceable seniority provisions by which employees' jobs can be protected.

T-DC employees freely transfer between units. (App. 109).[9] When they do, they retain their full company seniority for vacation, pension and fringe benefit purposes, but acquire "unit" seniority only from the date of entry into the new unit. Thus a "city" employee transferring to the "road" initially is relegated to a status which will acquire only the least desirable runs—while those who have previously had to await their turn—but who now have acquired experience and unit seniority, exercise their contractual options to bid first.

This seniority system is traditional—established in bargaining units which NLRB has designated—and is totally color-blind. Black, white and brown are treated equally without regard to race or national origin. Each may transfer between

[9] A few individual discriminatees were denied transfer by the employer. We agree that this discrimination, where demonstrated, should be corrected by assignment of unit seniority as of the date of the unlawful discrimination.

units. When he does, he carries his "company" seniority with him, but establishes "unit" seniority from the date of entry into the unit.

The sole claim against IBT is that the lawful, facially neutral seniority provisions in various local or area supplements to the National Master Freight Agreement tend to perpetuate the employer's discrimination. No other union practice is questioned, to the contrary, the Court of Appeals notes the union's efforts to diminish the effects of the employer's past discrimination.[10]

B

The Consent Decree

During the course of the trial in the district court the government and the employer entered a "Decree in Partial Resolution of Suit"[11] (to which IBT was not party) which the government admits,

> ". . . resolved those issues relating to TIME-DC's alleged pattern of hiring discrimination and its resulting obligation to affirmatively recruit and hire qualified Blacks and Spanish-surnamed Americans as new employees, and its alleged obligation to provide monetary compensation for those Blacks and Spanish-surnamed Americans whom the United States alleged were individual and class victims of past discrimination . . .[12]"

In brief summary, this Consent Decree required T-DC to recruit and hire Blacks and SSA's pursuant to specified procedures,

[10] See 517 F.2d at 316 under the heading: "Good Intentions and Recent Improvements." App. . . . .

[11] Appendix, pp. 85-93.

[12] Government's Brief to Court of Appeals, pp. 4-5.

set out qualifications for employment of minority persons, provided priority hiring for certain classes of minorities, and required prospective hiring in the ratio of at least one Black or SSA "for each white hired or transferred in vacancies in each job classification at each of its terminals and facilities until the number of Blacks and Spanish-surnamed Americans in each job classification at each terminal and facility is equal to the percentage of Blacks and Spanish-surnamed Americans in the city . . . where the terminal or facility is located . . ."

The Consent Decree further required T-DC to pay $89,500.00 to the government for distribution to alleged individual and class discriminatees in amounts to be determined by the government's attorneys, not to exceed $1,500.00 to any person; and left jurisdiction in the district court "for such further relief or other orders as may be appropriate."

C

The Seniority Findings and Order

On trial of the remaining issues the trial court found that T-DC[13] had engaged in a pattern or practice of racial discrimination, and that contracts between T-DC and various Teamster locals "while being neutral on their face, do, however, operate to impede the free transfer of minority groups into and within the company."

The trial court rejected the government's claim that all of some 600 incumbent minority employees should be granted

[13] And its many predecessors—TIME-DC is the result of ten mergers of motor carriers. See Opinion of the Court of Appeals at 517 F.2d 299, 304, where details as to the merger history are specified.

seniority relief.[14] Instead, the trial court held that not all minority employees were injured individually by being within the class—and that those who were injured were not all affected to the same degree. The District Court specified, Opinion 10/19/72, App. 56 at 62:

> This Court, in fact, does hold that some were not injured by being a member of the class, and that those who were injured were injured in varying degrees. There are no degrees of discrimination—discrimination is discrimination, and if made on the basis of race is deplorable whatever the degree; however there *are* degrees of injury due to that discrimination—and this is important in determining the equitable relief this Court should afford these individuals.

Accordingly, the relief accorded by the trial court to minority employees was apportioned in accordance with the trial court's view of the degree to which each was damaged by the employer's racial discrimination.[15] Four sub-groups of the

[14] The government originally sought abolition of the seniority system based on length of service in a job classification. The district court denied the request.

The government thereupon complained to the Court of Appeals (See Govt. Brf., p. 39) that:

> "the district court permitted the defendant company and the Teamsters to maintain the discriminatory seniority system for all the black and Spanish-surnamed American members of the affected class . . ." and "The district court erred in so permitting the discriminatory seniority system to continue . . ." for the Government says: ". . . a system of seniority based on length of service in a job classification is itself unlawful under Title VII for all members of the class and must be changed in order to comply with the Act."

The Circuit Court left the system intact, but assigned fictional road unit seniority to all minority employees; without regard to whether they had been adversely affected by racial discrimination. See p. 13, *infra*.

[15] See Trial Court's "Final Order," App. 94 at 100 ff.

minority employees were specified, viz.:[16] (A) thirty persons, all of whom were found to have suffered severe injury because of the class discrimination, were granted the right (denied to white employees) to transfer to road employment with substantional fictional road seniority; (B) a second group, found by the District Court to fall within a gray area, as to whom the evidence was insufficient "to show clear and convincing specific instances of discrimination or harm resulting from discrimination," yet believed by the District Court to be "very possibly the objects of discrimination . . ." and "likely harmed by such discrimination," were given the opportunity to transfer to road jobs with lesser seniority carryover; (C) a third group, as to which "the evidence fails to show that there was any injury or harm as a result of TIME's discriminatory practices," and found "clearly not injured by such discrimination," were denied relief. A fourth group (of over three hundred employees), as to whom the District Court "has no evidence to show that these individuals were either harmed or not harmed individually by the discrimination to the class as a whole," were held entitled to road vacancies[17] with seniority as of the date of future entry into the road unit.

The district court thus tailored the seniority remedy to the degree of injury found to result from the employer's racial discrimination.

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[16] See Trial Court's Opinion of October 19, 1972; App. 56 at 62.

[17] The trial court originally provided their preference over "the general public" (Opinion of October 19, 1972) App. 65; but later, over the union's objection, granted this group preference over incumbent white city employees (Order of March 19, 1973), App. 117.

D

The Court of Appeals' Opinion

The Court of Appeals rejected the trial court's remedy, holding, 517 F.2d 299 at 319, App. 34:

> ". . . we cannot accept the gradations of App. A, App. B, and App. C. For all we know, at this stage some on App. C may have suffered discriminations even more egregious than those whom the Government singled out to be persuasive witnesses to establish pattern and practice. All those on App. A, App. B and App. C are entitled to be given an opportunity to bid on future vacancies in the specified job classifications to which they are allowed to transfer by the District Court's order on the basis of their seniority and, if they qualify for those jobs, to be permitted to exercise their full seniority in such jobs for all purposes, including bidding and layoff."

The Court of Appeals' reference to "at this stage" would appear to indicate the Court believed that the trial had been bifurcated; that only liability had been determined—and that remedy was yet to be tried.

This is not the case. Actually, in a single, lengthy trial after literally years of discovery and depositions systemwide there was full trial on issues of both liability and remedy.

The Court of Appeals further held that seniority determinations could properly be made in the absence of the contracting union;[18] that despite current "laudable good faith effort to eradicate the effects of past discrimination," both TIME and IBT "have engaged in an extensive pattern of

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[18] 517 F.2d at 310ff; App. 16-18.

employment practices unlawful under Title VII and that strong remedial action is warranted."[19]

Accordingly, it jettisoned the remedy formulated by the District Court, held *all* minority employees entitled to preference for road jobs with fictional road seniority from the date each "had the experience necessary to qualify him for a road driving job" without regard to whether they had ever indicated a desire to transfer, or otherwise been shown to have been affected by racial discrimination;[20] held inoperative as applied to beneficiaries of this lawsuit a provision of the pertinent collective bargaining agreement which assured laid-off employees preference in reemployment for a three year period;[21] modified the bidding procedure in a portion of T-DC's operations "in a manner that would speed up the advancement of discriminatees into the [road] position . . .,"[22] vacated certain provisions of the district court's order relating to minorities as to whom there was no proof of injury; and remanded for further proceedings consistent with the Circuit Court's Opinion.

The Circuit Court specifically rejected the *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, tests of discrimination, holding that the criteria there specified for testing discrimination were applicable only in individual suits—and not applicable to "class" or pattern or practice cases. See 517 F.2d at 315-316, App. 27.[23]

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[19] 517 F.2d at 317; App. 29.

[20] See 517 F.2d 318; App. 34, 35.

[21] The court acknowledged "that the union contract provision granting laid-off L.Ds [road drivers] a three year period in which they may move into vacancies at their home terminal without competition was not adopted for discriminatory purposes." 517 F.2d at 322, App. 40-41.

[22] 517 F.2d at 323, App. 43.

[23] Cf. *Rodriguez v. ETMF*, 505 F.2d 40 at 55-56 (5th Cir. 1974), petition for certiorari pending.

REASONS FOR GRANTING THE WRIT

For more than a decade[24] the EEOC, the lower federal courts, employers, employees, unions and civil rights organizations have been making various applications of the law of employment discrimination as it affects seniority. Yet in 1975, as in 1971, "none of the important [seniority] issues have as yet been authoritatively determined by the Supreme Court, and the present judicial authority does not speak univocally on the major issues." 84 Harv. 1109, 1165 (1971).[25]

Questions as to how seniority is to be allocated in inter-bargaining unit transfer situations; the proper forms of seniority relief, the criteria by and purposes for which relief is to be formulated; allocations of burden of proof; the extent to which incumbents' contractual rights may be limited; what parties are necessary to a determination of seniority rights in a Title VII case; indeed, the very question of what constitutes an unlawful "pattern or practice" cognizable under § 707(a) of the Act are here presented. They are of utmost importance to tens of thousands of motor carrier employees, and the more than five hundred local unions which represent them, as well as hundreds of carrier employers.

In this industry alone, prohibitively expensive litigation involving these or related issues is proliferating in the lower

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[24] Title VII was passed in 1964 and became effective in July, 1965.

[25] Certiorari granted in *Franks v. Bowman* (October 1974 term No. 74-728) will present the narrow issue as to whether individuals found to have been denied initial employment solely because of race are entitled to be made whole by assignment of seniority from the date they would have been employed absent discrimination. And this Court's *McDonnell-Douglas v. Green* has provided criteria by which individual claims of racial discrimination are to be judged, 411 U.S. 792 at 802.

courts;[26] and the unrest on the freight docks associated with pressure to change seniority patterns is exacerbated by the uncertainty engendered by the jungle of conflicting notions published by EEOC and the lower federal courts.

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[26] *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *McDonald v. Santa Fe Trail Transp. Co.*, 513 F.2d 90 (5th Cir. 1975); *Hairston v. McLean Trucking Co.*, 11 FEP Cases 91 (4th Cir. 1975); *Resendis v. Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974); *Herrera v. Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974); *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Henderson v. Eastern Freightways, Inc.*, 460 F.2d 258 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *Witherspoon v. Mercury Freight Lines, Inc.*, 457 F.2d 496 (5th Cir. 1972); *Bing v. Roadway Express Co.*, 444 F.2d 687 (5th Cir. 1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *cert. denied* 401 U.S. 954 (1971); *Johnson v. Georgia Highway Exp., Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Taylor v. Pacific Intermountain Express Co.*, 394 F.Supp. 72 (N.D. Ill. 1975); *Maldonado v. Yellow Freight System, Inc.*, 10 FEP Cases 1290 (C.D. Cal. 1975); *Salinas v. Roadway Express, Inc.*, 10 FEP Cases 1173 (W.D. Tex. 1975); *United States v. East Texas Motor Freight System, Inc.*, 10 FEP Cases 971 (N.D. Tex. 1975); *Jones v. Pacific Intermountain Express*, 10 FEP Cases 913 (N.D. Cal. 1975); *Sagers v. Yellow Freight System, Inc.*, 388 F.Supp. 528 (N.D. Ga. 1974); *E.E.O.C. v. Braswell Motor Freight Lines*, 8 FEP Cases 754 (N.D. Tex. 1974); *E.E.O.C. v. McLean Trucking Co.*, 7 FEP Cases 299 (W.D. Tenn. 1974); *United States v. Lee Way Motor Freight, Inc.*, 7 FEP Cases 710 (W.D. Okla. 1973); *United States v. Pilot Freight Carriers, Inc.*, 6 FEP Cases 280 (M.D. N.C. 1973); *United States v. Navajo Freight Lines, Inc.*, 6 FEP Cases 274 (C.D. Cal. 1973); *Hayes v. East Texas Motor Freight, Inc.*, 6 FEP Cases 1000 (W.D. Tenn. 1972); *Allen v. Terminal Transport Co., Inc.*, 5 FEP Cases 673 (N.D. Ga. 1972); *United States v. Central Motor Lines*, 338 F.Supp. 532 (W.D. N.C. 1971); *Black v. Central Motor Lines, Inc.*, 1 FEP Cases 586 (W.D. N.C. 1968). (This list is only a fraction; scores of discrimination suits against freight carriers and unions in the transportation industry are pending in the District Courts, and are, as yet unreported.)

Some assert departmental or "bargaining unit" seniority to be suspect,[27] if not unlawful.[28] Others require, as in the instant case, class assignment of fictional unit seniority solely on the basis of race.[29] Others focus upon the individuals claiming discrimination, and applying criteria like those defined in this Court's *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), assign such seniority as the proof shows the individuals would have achieved, absent racial discrimination.

Seniority awards in Title VII Civil Rights employment cases vary according to Circuit,[30] or District;[31] or according to whether

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[27] *Quarles v. Phillip Morris, Inc.*, 279 F.Supp. 505 at 518; *U.S. v. Jacksonville Terminal, et al.*, 451 F.2d 418 (1971); cert. den. 406 U.S. 906.

[28] See Government brief to Court of Appeals in this case at p. 39; note 14, p. 11, *supra.*

[29] *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974); *United States v. Pilot Freight Carriers, Inc.*, 6 FEP Cases 280 (M.D.N.C. 1973); *United States v. Navajo Freight Lines, Inc.*, 6 FEP Cases 274 (C.D. Cal. 1973).

[30] *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) (seniority based on date six months after class member applied for job, or filed EEOC charge protesting denial of job, and was qualified for job); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 451 (5th Cir. 1973) (seniority based on date class member was qualified and job vacancy existed—no application or EEOC charge required); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974) (seniority based solely on qualification).

[31] *United States v. Lee Way Motor Freight, Inc.*, CCH Employment Practices Guide, ¶ 5285 (W.D. Okla. 1974) (vacancy, qualification and interest in job required); *United States v. T.I.M.E.-DC*, 6 F.E.P. Cases 690 (N.D. Tex. 1972) (application, qualification and vacancy required); *United States v. Navajo Freight Lines, Inc.*, 6 F.E.P. Cases 274 (C.D. Calif. 1973) (full carryover seniority awarded with no proof that class member would have had job but for discrimination); *United States v. Central Motor Lines*, 338 F.Supp. 532 (W.D.N.C. 1971) (full seniority, no individual discrimination proof required); *Diaz v. Pan American World Airways, Inc.*, 346 F.Supp. 1301 (S.D. Fla. 1972) (unit seniority to begin only upon actual entry into unit).

the action is "pattern or practice";[32] "class"[33] or "individual" action.[34]

This uncertainty[35] in the application of an important federal law applicable to millions of workers throughout the nation should be allayed by decision here.

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[32] *United States v. International Bhd. of Teamsters*, Civil No. 73-2214 (5th Cir. 1975) (individualized proof of discrimination not required or permitted until hearing on remedy, and seniority will then be based solely on qualification date). Compare *Leeway*, D.C. Okla., note 31, *supra;* and *Rodriguez v. East Texas Motor Freight et al.*, 505 F.2d 40 at 55 (5th Cir. 1974).

[33] *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) (individualized proof of discrimination determined at liability trial and seniority based on qualification and vacancy). *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) (individualized proof of discrimination determined at liability stage and seniority based on 6 months after application or EEOC complaint and qualification).

[34] *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 677 (discrimination proof requires showing of racial minority, vacancy, application and qualification).

[35] The Court of Appeals in this very case noted its uncertainty as to one aspect of seniority remedy when it observed, 517 F.2d 299 at 317; App. p. 31.

> But in any event, we would caution all parties that the citing of *Franks* is merely the repetition of the current state of the law in the Fifth Circuit. Certiorari has recently been granted by the Supreme Court on *Franks* and of course all wait with baited breath for the outcome produced by the great people east of the Potomac River. The flexibility we have given the District Court on remand is elastic enough to accommodate whatever wisdom will come from the Highest Court.

ARGUMENT

"More than any other provision of the collective bargaining agreement, including union security provisions under existing law, seniority affects the economic security of the individual employee covered by its terms."[36] And this Court in *Humphrey v. Moore* recognized that: "Seniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job" 375 U.S. 335 at 346, 347.

The problem presented by this case, and the hundreds like it, is to find an appropriate balance between seniority rights provided in collective bargaining contracts and the statutory rights of minority workers to be free of racial discrimination.

1

Petitioners see that balance in maintaining the present, admittedly lawful, separate unit seniority system, assigning "unit" seniority to all regardless of race or color as of the date of entry into the unit.

Within this lawful seniority framework, individuals who have been discriminatorily denied entry or transfer into the unit should be assigned unit seniority as of the date they would have entered the unit absent employer discrimination. Petitioners' insistence upon this assignment of "rightful place" seniority application has met with varying results in the lower federal courts.[37]

Two Circuit Courts have written on the question. The Sixth Circuit in *Thornton v. ETMF and Teamsters Local 667*, 497 F.2d 416 (1974), provided carryover seniority, city to road, to those minority transferees who had demonstrated that they were

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[36] Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L.R. 1532, 1535 (1962).

[37] See notes 26-31, *supra*, pp. 16-18.

affected by the employer's discrimination and had given prior indication of desire to transfer city to road. The Fifth Circuit in *Bing v. Roadway and Teamsters*, 485 F.2d 441, at 450 properly observed "how much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination," but contrary to *Thornton*, held that prior indication of desire to transfer was unnecessary, and ruled that upon a showing of proof of *present* wish for transfer, seniority carryover from city to road should be measured from the date that the putative transferee possessed road qualifications.

But now the Fifth Circuit is departing from its own *Bing* ruling. See *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 at 63ff (1974), pending on certiorari, where after giving lip-service to the *Bing* rule, the Court specifically rejected the Sixth Circuit's *Thornton* rationale, as well as the trial court's *Rodriguez* findings, and held that all minority employees are to be given carryover seniority based not upon any showing of when the individual would have transferred absent discrimination, but upon "whether he desires to transfer now," 505 F.2d at 64.

In the instant case the Fifth Circuit moves even farther from the proper application of the "rightful place" rule. For the trial court's findings as to when individuals were discriminated against are jettisoned, the Court of Appeals refuses to focus on individual seniority rights and holds, 517 F.2d 299 at 319; App. 34:

> All those on App. A, App. B and App. C are entitled to be given an opportunity to bid on future vacancies in the specified job classifications to which they are allowed to transfer by the District Court's order on the basis of their seniority and, if they qualify for those jobs, to be permitted to exercise their full seniority in such jobs for all purposes, including bidding and layoff.

This refusal to focus on individual situations, and the wholesale grant of seniority carryover to all minority employees,

whether or not they were affected by racial discrimination is impermissible reverse discrimination. As Senators Clark and Case, the floor managers of Title VII in the Senate explained:

> "* * * It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against."[38]

In sum on this point, Petitioners assert that seniority is to be individually determined,[39] and allocated upon a showing of the "rightful place" which would have been occupied absent discrimination. The Sixth Circuit in *Thornton*, and the Fifth in *Bing* originally took that approach.[40] But in *Rodriguez* and the instant case, the Fifth Circuit looks only to the class, rejects the trial court's focus upon the facts pertinent to each individual, and awards remedy to the class, without regard to which of those in the class were actually damaged.

Moreover, the Court of Appeals specifically refuses to apply this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973); viewing it as "inapplicable to a pattern or practice suit such as the one before us." 517 F.2d at 316; App. 27.

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[38] EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (hereinafter Leg. Hist., p. 3040).

[39] Teamsters have substantial experience in ascertaining pertinent facts and settling or arbitrating seniority claims. "One third of the time of union officers is spent in employee grievances over seniority." 84 Harv. L.R. 1109 at 1157.

[40] Though, as we have indicated, there is clear conflict between the Sixth in *Thornton*, and the Fifth in *Bing*, *Rodriguez*, and the instant case as to whether present desire to transfer is sufficient to base award of carryover seniority without some showing of prior intent to make the move.

2

Hard-bargained admittedly lawful contractual rights assuring job security and recognized by this Court to be of "overriding importance"[41] must give way, the Circuit Court says, only because a third party—the employer—discriminated in hiring and job assignment. According to the Court of Appeals, employees who had no part in the discrimination must be deprived of lawful contractual rights to job security solely because of their employer's wrongs. Drivers on layoff with contractual rights to recall must give way to beneficiaries of the Circuit Court's order, despite a finding by the Court of Appeals that the contract providing recall rights "was not adopted for discriminatory purposes."[42]

This jettisoning of contract rights is required despite the fact that the contracts have none of the elements of "line of progression."[43] or racial blockages on an escalator from entry level to skilled jobs—so familiar in the case law relating to industrial plants, but wholly inapposite here. Entry into any Teamster freight unit is at top level. The wage is the same for the newest and the oldest employee.

Nevertheless the Circuit Court requires wholesale carryover unit seniority to the beneficiaries of its order, and thus substantially diminishes the contract rights of incumbent and laid-off drivers.

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[41] *Humphrey v. Moore*, 375 U.S. 335, 346.

[42] See 517 F.2d 299 at 322 (App. 41) where the Circuit Court held:

> We recognize that the Union contract provision granting laid-off LDs a three-year period in which they may move into vacancies at their home terminal without competition was not adopted for discriminatory purposes. Nevertheless, we believe that to allow LDs a three-year priority right on future openings would unduly impede the eradication of past discrimination.

[43] See 517 F.2d at 305; App. 6.

The decision thus runs afoul of the statute which assures in § 703(h) that application of bona fide seniority systems is not unlawful.[44] The statutory language is reinforced by the legislative history. Senators Clark and Case, the Senate managers of the bill, disturbed by assertions of those who opposed the bill that Title VII would "destroy seniority,"[45] published an authoritative memorandum, which established that:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business had been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (110 Cong.Rec. 6992, Daily ed. 4/8/64).

The memorandum makes it clear that Title VII does not require that incumbent whites be fired so that Blacks may be hired or that their seniority rights be curtailed for the benefit of new Black employees; such action would clearly involve preferring these Blacks because of their race, and would subvert the basic principle of any seniority system.

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[44] § 703(h) provides:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; . . .

[45] See 110 Cong. Rec. 459 (daily ed. 1/15/64); 6871 (daily ed. 4/7/64); 12783 (daily ed. 6/10/64).

This legislative history also demonstrates that the statute did not authorize, much less require, a court to accelerate the advancement of Blacks simply because of their race. Yet the Court of Appeals quite candidly tailors a remedy for just that purpose, stating that a ". . . purpose of seniority carryover . . . is to give the discriminatee the incentive to transfer . . ."[45a]

3

The conclusion of the Court of Appeals that T-DC and IBT "have engaged in an extensive pattern of employment practices unlawful under Title VII . . . ,"[46] is based in large part upon a statistical showing of ratios of majority to minority incumbencies in 1971.

The Circuit Court views incumbency figures in 1971 as "of decisive significance" and demonstrating "flagrant statistical deviations."[47] The fact is, however, that pre-Act, the T-DC figures were much worse; and the employer's pre-Act discrimination is acknowledged. The further fact, undisputed but not displayed in the Circuit Court's Opinion, is that while T-DC system employment declined from 7,238 in 1967 to 6,424 in 1972 (a decrease of 11%) the number of minorities increased from 512 to 677 in the same years (an increase of 32.2%).[48]

[45a] 517 F.2d 299 at 318; App. 31.

[46] 517 F.2d 299 at 317; App. 29.

[47] 517 F.2d at 314; App. 23. A line of lower court cases collected at note 27 of the Circuit Court's Opinion (at p. 313) also hold statistical deviations of ratios of incumbent workers to be of critical, perhaps decisive significance in proof of racial discrimination.

[48] In the only terminals about which the Government produced witnesses total employees declined by 12%, while percentage of minorities increased 20.6%, with increase of blacks at these ten terminals to 28.5% of the work force. See Exhibit "UU" and undisputed testimony at Ct. of Appeals App. p. 451ff. A T-DC campaign to hire minorities resulted in the year 1971 "new hires" being

Indeed, the Circuit Court acknowledges the "recent minority hiring progress stands as a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment;" 517 F.2d 299 at 316, App. 27, 28.[49]

The *pertinent* statistics then are those relating to post-Act hiring and job placement. Those statistics show meaningful, and effective progress in minority employment—indeed, at a ratio showing *preference* for minorities.

The Act and its legislative history make clear that "if a business had been discriminating in the past and as a result has an all white working force, when the Title comes into effect the employer's *obligation would be simply to fill future vacancies on a non-discriminatory basis.* He would not be obliged—or, indeed permitted— to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier," 110 Cong. Rec. 7212-7215 (4/8/64), emphasis added.

Disregarding the statute and its legislative history, the Circuit Court finds pattern or practice on the basis of inapposite statistics—and refuses to evaluate those which demonstrate the pertinent facts. By this simplistic approach—viewing present incumbency ratios rather than the post-Act hiring and job alloca-

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16.9% minority—while significantly 18.3% of the newly hired western road drivers were minorities. In the western portion of the system 23.1% of the new hires in 1971 were minorities. And this despite the fact that the undisputed evidence is that qualified minority road drivers are in short supply.

[49] The Opinion notes that the total number of minorities employed increased from 7.1% in 1967 to 10.5% in 1972 and to 13% in 1973. During 1971, 16.9% of new hires were members of minority groups, and during the first six months of 1973, 72 out of 113 new hires, or 64% were minority group members. 30% of the road drivers hired in 1973 (29 of 95) were minority group members. 517 F.2d at 316, note 31; App. 28.

tion movements—a pattern or practice of discrimination will always appear. There can be no defense to such a claim—if statistics held dispositive by the Circuit Court are permitted to establish the violation.

For pre-1974 there were nationwide patterns and practices of discrimination—else the Act would not have been passed. Is every employer and every union engaged in a pattern or practice of resistence to the full enjoyment of any of the rights secured by this Title" (§707(a)) until whites have been fired, or only minorities have been hired and allocated to each classification to bring present incumbency ratios, plantwide and unit, up to standard Metropolitan Statistical Area ratios?

The opponents of Title VII, seeking to defeat it, publicized that the bill's "true interest and purpose" was to achieve racial balance, not merely to end discrimination.[50] Specifying the "threat" which they perceived, the opponents of Title VII declared:

> "Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must then go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law.
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> "Neither compentence nor experience is the key for employment under this bill. Race is the principal, first, criterion."[51]

[50] EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2067-68.

[51] Idem. p. 2071.

These accusations were countered by the bill's sponsors, viz:

> "It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its contined existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification."[52]

And on the Senate side, the Bill's sponsors were even more specific. Senators Clark and Case explained:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. * * *"[53]

The bill was passed upon these assurances.

Yet implicit in the Circuit Court's ruling here is that failure to move from imbalance in 1964 to present racial balance in the work force is "of decisive significance" in determining the existence of violation of the Act.

[52] Idem. p. 2150.

[53] Idem. p. 3040.

4

From the error just exposed flow yet two other errors in the Circuit Court's analysis which should be corrected here. Having bootstrapped a pattern or practice from pre-Act, inapposite statistics, the Circuit Court then places the burden upon the defendants to show that individuals within the class were not the victims of discrimination.[54]

And to compound the error, the Circuit Court refuses to apply "the analytical steps delineated by the recent case of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973);" on the ground that criteria by which discrimination is proved in an individual's suit under §§ 703 and 704 are "inapplicable to a pattern and practice suit."[55]

Respectfully, we suggest it does not make sense to accord more relief—or require a lesser proof—when the government sues, than when an individual makes the claim. In either instance, the inquiries are: was there racial discrimination—was the individual damaged thereby? What will it take to put the worker in the position he would have enjoyed absent discrimination? It will not do to evade these inquiries—and grant pay or seniority or other employment benefits solely on the basis of race.

5

Finally, the error of the Circuit Court in allowing seniority to be allocated in the absence of the unions which have contracted for that seniority[56] should be reviewed here.

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[54] 517 F.2d 299 at 315, headnote 6. Cf. *Rodriguez v. ETMF*, 505 F.2d 40 at 54 (5th Cir. 1974): "Once the plaintiffs established a prima facie case, the burden fell to the defendants to rebut the statistics . . ."

[55] 517 F.2d 299 at 316; App. 27.

[56] 517 F.2d 299 at 310; App. 16-18.

The National Master Freight Agreement provides with respect to seniority only that "seniority rights shall prevail under this agreement . . ." and "the extent to which seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental Agreements." And it is stipulated that seniority rights are defined in the local union contracts.[57]

Other panels of the Fifth Circuit have recently dismissed the IBT in Title VII cases, recognizing that which is stipulated here, that the collective bargaining contracts are with autonomous local unions, not the International, and the seniority provisions are in area or local supplements. So in *Resendis v. Leeway*, 505 F.2d 69 (1974), the Fifth Circuit held: "We find no violation of Title VII by the defendant Teamsters International. See *Herrera v. Yellow Freight System, Inc.* (5th Cir. 1974), 505 F.2d 66, n. 2."

And in *Herrera* it was held: "Because the separate seniority lists originate at the Southern Conference level, we find no violation of Title VII by the defendant Teamsters International," 505 F.2d 66 at 68.

Here, the *Herrera* and *Resendis* decisions by another panel of the Fifth Circuit were ignored, and seniority rights determined in the absence of the union entities which had negotiated and are charged with the duty of enforcing the seniority provisions of the contract.[58]

Both as a matter of law, and of sensible labor relations, the recognized bargaining agent which structured the particular

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[57] See Pre-Trial Order, ¶ 3(6).

[58] Yet another panel of the Fifth Circuit has affirmed a ruling that where an autonomous local union is the bargaining agent and subject to a duty of fair representation, the International with which it is affiliated may not be held to a duty of fair representation. *Encina v. Tony Lama*, 316 F.Supp. 239, 245; affirmed, 448 F.2d 1264 (5th Cir. 1971).

seniority plan, and which daily polices the seniority provisions of the local contract, should be before the court which applies, or accommodates the seniority article to the requirements of the Civil Rights Act. See the District Court's Opinion in preliminary stages of this case, 335 F.Supp. 246, App. 45-49.

Pertinent here is the recent Sixth Circuit's holding in *Meadows v. Ford Motor Company*, 510 F.2d 939, 949 (1975):

> ". . . where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.
>
> * * * * * * * *
>
> a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay Section of this opinion. The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force. We do not assume, as our brethren in the Fifth Circuit appear to (Local 189, AFL-CIO, CLC v. United States, 416 F.2d 980, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970)), that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. See also Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), vacated, 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214 (1973), reinstated, 497 F.2d 403 (3d Cir. 1974). Cf. Local 189, *supra*; Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir.), cert. denied, 43 U.S.L.W. 3330, 419 U.S. 1050, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974) (No. 74-424).
>
> On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master. For purposes of that hearing notice should be given to the employees likely to be affected and intervention should be allowed from appropriate representatives."

The Fifth Circuit in the instant case rejected the Sixth Circuit's view and held ". . . that adequate and effective relief may be granted without unduly prejudicing the absent local unions . . ." 517 F.2d at 311, App. 18.

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment.

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